Filed 11/9/09 P. v. Martinez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LARRY DANIEL MARTINEZ, Defendant and Appellant.	E046717 (Super.Ct.No. SWF025126) OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso, Judge. Affirmed.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Following the denial of his motion to suppress evidence under Penal Code section 1538.5, defendant Larry Daniel Martinez entered a guilty plea to a misdemeanor, owning

and possessing ammunition, in violation of Penal Code section 12316, subdivision (b)(1)). On Fourth Amendment grounds, he now challenges the denial of his motion to suppress evidence.

FACTUAL AND PROCEDURAL BACKGROUND

At the preliminary hearing, a police detective testified he and several other officers were involved in executing a search warrant at a residence in Hemet on March 20, 2008. The purpose of the warrant was to search for gang paraphernalia in connection with charges against a third party named Anthony Joseph Herrera (Herrera), who allegedly was "the son of the lady who lived at the address." Herrera was arrested during a traffic stop on January 10, 2008. The driver consented to a search of the vehicle and 7.5 grams of methamphetamine was seized. When interviewed, the driver admitted he was helping Herrera sell drugs by driving him around. Charges pending against Herrera included gang enhancements. At the time of his arrest, Herrera indicated he lived at the subject address in Hemet.

Defendant was present inside the residence in Hemet when police arrived there to execute the search warrant. Defendant answered the door and told the detective he lived there. The detective arrested defendant after determining he had an outstanding warrant. He then searched a man's plaid shirt that was hanging on a chair in the kitchen of the residence. A large caliber live bullet was found inside the shirt.

After the preliminary hearing, defendant filed a Penal Code section 1538.5 motion to suppress evidence, arguing the search warrant was invalid because there was no probable cause. Although stating it was "a close call," the court denied the motion.

Defendant was originally charged with a felony violation of Penal Code section 12316, subdivision (b)(1), based on the discovery of the bullet. However, on September 22, 2008, the court granted the People's motion to reduce the charge to a misdemeanor. Defendant then pled guilty to a misdemeanor violation of Penal Code section 12316, subdivision (b)(1), and the court granted him probation for a period of 36 months.

DISCUSSION

Defendant contends the search warrant violated the Fourth Amendment prohibition against unreasonable searches and seizures because it was based on stale information. According to defendant, the home address Herrera provided to police when he was arrested was stale information because Herrera had been in jail and had not lived at the residence for a period of 67 days, and police had nothing to indicate he still stored his belongings at this location. In addition, there was no evidence of continuing criminal activity at the residence.

In reviewing a denial of a motion to suppress, we defer to the trial court's factual findings where they are supported by substantial evidence and, based on these factual findings, we exercise our independent judgment to determine whether the search was reasonable under Fourth Amendment standards. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) To determine whether evidence must be excluded because of a Fourth Amendment violation, "we look exclusively to whether its suppression is required by the United States Constitution." (*Glaser*, at p. 362.)

"The question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1040.) "[D]etermination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed." (*United States v. Grubbs* (2006) 547 U.S. 90, 95.) Court's have recognized that a suspect's home may be a logical place to search for incriminating evidence depending on the nature of the alleged crimes and the items being sought. (*People v. Carrington* (2009) 47 Cal.4th 145, 163 (*Carrington*).)

"Stale information in a search warrant affidavit does not establish present probable cause for a search." (*People v. Hirata* (2009) 175 Cal.App.4th 1499, 1504.) "No bright-line rule defines the point at which information is considered stale. [Citation.] Rather, 'the question of staleness depends on the facts of each case.' [Citation.] 'If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale.' [Citation.] [¶] Courts have upheld warrants despite delays between evidence of criminal activity and the issuance of a warrant, when there is reason to believe that criminal activity is ongoing or that evidence of criminality remains on the premises. [Citations.]" (*Carrington*, *supra*, 47 Cal.4th at pp. 163-164.)

For example, in *People v. Brown* (1985) 166 Cal.App.3d 1166 (*Brown*), a citizen reported seeing marijuana plants growing on a neighbor's land. About six weeks later, a deputy obtained a search warrant and observed approximately 100 marijuana plants

growing on the property. He decided to observe the property until he saw someone on it and then enter with the warrant and make an arrest. Based on continued observations of the property, he obtained successive warrants until the defendant was arrested and the plants were seized. (*Id*. at pp. 1168-1169.) The defendant argued the warrants were invalid, because the original warrant was based on stale information. (*Id*. at p. 1169.) The appellate court rejected the argument even though the deputy did not obtain a search warrant until six weeks after the plants were reported to him. (*Id.* at p. 1170.) The information relied on to issue the first warrant was not stale, because the plants were observed "in a very early stage of growth" in cultivated rows and an irrigation system was in place indicating the marijuana was being purposely grown. (*Ibid*.) Thus, under the circumstances, there was a reasonable inference the activity was a continuing one and the plants would still be growing there a month or so later. (*Ibid*.)

In reaching its conclusion, the appellate court in *Brown* noted that a lapse of time, standing alone, is not controlling. In a case involving an activity such as marijuana cultivation, probable cause can still exist even after a relatively long delay. However, in other cases involving "highly transitory activity," such as the sale of narcotics, even a brief delay may preclude a finding of probable cause. (*Brown, supra*, 166 Cal.App.3d at p. 1169.) In cases involving this type of activity, "delays of more than four weeks are generally considered insufficient to demonstrate present probable cause." (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652 (*Hulland*).)

Here, in support of his argument that the search warrant was based on stale information, defendant relies on cases involving the "highly transitory activity" of the

sale of narcotics, such as *Hulland*, *supra*, 110 Cal.App.4th at pages 1652-1653, *Hemler v. Superior Court* (1975) 44 Cal.App.3d 430, 433-434, and *People v. Hernandez* (1974) 43 Cal.App.3d 581, 586. In these cases, the issue was the constitutionality of the delay between the time police had knowledge of a sale of controlled substances and the date police relied on this information in an affidavit to obtain a search warrant of a residence related to the sale with little or no information suggesting controlled substances could still be located in the residence. In *Hulland*, *supra*, 110 Cal.App.4th at page 1648, a police officer purchased drugs from a defendant in a controlled buy and then waited 52 days to seek a warrant for two residences where the defendant allegedly lived. In *Hemler v. Superior Court*, *supra*, 44 Cal.App.3d at page 432, an informant was observed while purchasing cocaine in a residence where the defendant lived. During the transaction, the informant asked whether he could buy more, and the seller responded, " 'I'll try for it.' " Police waited 34 days to seek a warrant. The appellate court held the warrant was void for lack of probable cause, particularly given the weak inference that additional cocaine could have been found in the premises on the day of the transaction. (*Id*. at pp. 434-435.) An even shorter delay of 12 days in *People v. Hernandez*, *supra*, 43 Cal.App.3d at page 586, was found to be "on the fringe of unreasonableness," because there was only weak information indicating the controlled substance could even be found on the premises on the day the transaction took place.

The facts and circumstances of this case are easily distinguished from cases involving "the often highly transitory activity of the sale of [controlled substances]." (*Brown*, *supra*, 166 Cal.App.3d at p. 1169.) Herrera, who was the subject of the search

warrant, was connected to a particular gang as a result of prior contacts with the police and was charged with a new offense with gang enhancements; police needed evidence demonstrating continued gang involvement and affiliation. The search warrant was seeking access to items which are not "highly transitory." For example, the search warrant affidavit mentions items such as gang clothing, printed or digitally stored photographs of gang members wearing gang clothing and/or throwing gang signs, and other memorabilia, like newspaper clippings about the gang's criminal activity. In common experience, the items sought are of the type people tend to keep for an indefinite amount of time. In addition, the affidavit submitted in support of the warrant was prepared by a police detective with extensive experience in gang-related arrests, who stated that "gang members are proud of their membership and do not dispose of items tending to show their membership." Herrera's last known address, i.e., the one he gave police when he was arrested, was a logical place to search for these items even though defendant had obviously not lived there since the date of his arrest.

Based on the foregoing, it is our view that the search warrant was not based on stale information. We therefore cannot disagree with the trial court's decision to deny defendant's motion to suppress. In our independent judgment, there was probable cause for the issuance of the search warrant.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.